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In the Supreme Court of the United States

OCTOBER TERM, 1924

THOMAS AGNELLO ET AL., PETITIONERS
v.
THE UNITED STATES OF AMERICA
No. 45

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT

The five petitioners (hereafter called the defendants) were tried in the Eastern District of New York on an indictment which charged them with (1) conspiring to sell, and (2) actually selling, heroin and cocaine without having first registered with the Collector of Internal Revenue, contrary to the Harrison Act as amended (act of Dec. 17, 1914, c. 1, 38 Stat. 785, as amended by act of Feb. 24, 1919, c. 18, 40 Stat. 1057, 1130) and contrary to Section 37 of the Penal Code.

At the trial the second count of the indictment was dismissed on the ground that it failed to allege that the offense was committed within the jurisdiction of the court. (R. p. 501, 512.) The case went

to the jury on the first count alone, and all five defendants were found guilty and duly sentenced. The convictions were affirmed by the Circuit Court of Appeals. The opinion below is reported in 290 Fed. 671, and appears in the record at page 521. The defendants then petitioned this Court for a writ of certiorari, and in this petition the United States concurred. The writ was granted on April 30, 1923 (262 U. S. 738).

The one important question involved is as to the admission in evidence of a can of cocaine hydrochloride found by Government agents, immediately after the arrest of the defendants, in the bedroom of defendant Frank Agnello. For a correct understanding of this question, the attendant circumstances must be briefly reviewed.

Two Government employees, Napolitano and Dispenza, twice visited No. 138 Union Street, Brooklyn, the home of defendant Alba, on Saturday, January 14, 1922, and offered to buy narcotics. Alba supplied them with samples; and an appointment was made for another visit on Monday, January 16th. (R. pp. 10–18.) On the latter day, Napolitano and Dispenza returned to No. 138 Union Street and went inside. (R. p. 20.) Six Federal narcotic agents (Oyler, Connolly, McCormick, Manning, Mellon, and Pacetta) and a city policeman (Moog) remained on watch in the street, where they were able to see through the windows into the house. (R. pp. 71, 72.) On entering the house, Napolitano and Dispenza found defendant Alba, who then went

out and returned, bringing defendant Centerino with him. (R. p. 20.) After some conversation, partly in the house and partly on the street in front of the door, Centerino went away to fetch the narcotics, and was followed by some of the officers to No. 172 Columbia Street (Centerino's home), and from there to No. 167 Columbia Street (the home of Pace and Frank Agnello). (R. p. 73.) All these places were within a few blocks of each other. (R. pp. 428, 459–462.) After about ten minutes Centerino came out of 167 Columbia Street, accompánied by the two Agnellos and Pace. (R. p. 74.) Centerino's own evidence (R. pp. 397–399) was that he had taken some cocaine from a closet in his own house and had carried it over to 167 Columbia Street, where he gave it to Frank Agnello to carry back for him to Alba's house.

Centerino, the two Agnellos, and Pace, then returned to Alba's house, No. 138 Union Street, and went inside. (R. p. 74.) A few minutes later, the officers, looking through the window, saw the defendants in the very act of selling narcotics to Napolitano and Dispenza. (R. pp. 76–77.) The officers thereupon entered the house and placed all the defendants under arrest. They found some packages of narcotics on the table in the front room, and some other packages on the person of Frank Agnello. (R. p. 79.) In Alba's pockets they found the marked money which had just been paid to him by Napolitano. (R. p. 90.) Immediately after the

arrest, while some of the officers were taking the defendants to the police station, officer Manning and the others, without a search warrant, returned to 172 Columbia Street, which they searched without result. (R. pp. 485, 486.) They then went to 167 Columbia Street, which was an Italian grocery store; and in a bedroom on the ground floor, on top of a wardrobe, they found a can of cocaine hydrochloride. (R. pp. 486–488.) It is undisputed that the bedroom was occupied by Frank Agnello, and that the wardrobe was one in which he kept his clothes. (R. p. 478.)

This can, and the account of the search, were offered in evidence as part of the Government's main case, but were excluded. (R. p. 85.) They were again offered in rebuttal, to contradict the statements of Frank Agnello that he did not know he was carrying narcotics and that he had never seen the can until the trial. This time they were admitted in evidence over objection. (R. pp. 472, 477, 485–488.) Their admission is assigned by the defendants as error.

It is apparent that the facts of this case serve to differentiate it in several important respects from the cases of unlawful search and seizure previously considered by this Court.

In the first place, it must be noted that the article seized was not a document or a similar thing which had merely evidentiary value. It was a thing inherently vicious, which was used as the means of committing a crime, analogous to burglar's tools or

lottery tickets. *Commonwealth* v. *Dana*, 2 Metc. (43 Mass.) 329. In the second place, the seizure was practically contemporaneous with the arrest. The arrest was lawfully made without a warrant, for a felony committed in the actual sight and presence of the officers; and *immediately thereafter*, a search was made in the place whence the officers themselves had just seen the culprits emerge. This search disclosed the can of cocaine hydrochloride, an article used in the commission of crime, in the bedroom of one of the persons just arrested. Finally, it must be noted that no demand was made by the defendants, either before or during the trial, for the return of the articles seized, although they must have known of the seizure, which was carried out perfectly openly. *Adams* v. *New York*, 192 U. S. 585; *Weeks* v. *United States*, 232 U. S. 383.

ARGUMENT

I

The article seized was not one which could be used as evidence merely. It was itself an instrument of crime, analogous to lottery tickets, burglars' tools, counterfeit coin, or to weapons found in the possession of one suspected of homicide. The Harrison Act provides:

> SEC. 8. That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the

> aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act * * *. [Act of Dec. 17, 1914, c. 1, 38 Stat. 785, 789.]

Section 1006 of the Revenue Act of 1918, amending section 1 of the Harrison Act, provides:

> That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed. [Act of Feb. 24, 1919, c. 18, 40 Stat. 1057, 1131.]

In view of these statutory provisions, it is submitted that counsel for the defendants are in error when they state (page 21 of their brief) that the possession of opium is not an offense under the Harrison Act, and that narcotics are not forfeitable to the United States. The possession of opium, if not an offense, is presumptive evidence of an offense; and the opium, if unstamped, is forfeitable.

This case then furnishes no example of the practice, so often condemned by this Court, of searching among a defendant's papers in the hope of discovering evidence which may prove useful as evi-

dence against him. It is rather an example of search made immediately after an arrest for openly committed felony, to discover the instruments with which the felony was committed. In this connection it must be noted that one of the overt acts specified in the indictment is:

> That during the continuance of the said conspiracy and for the purpose of effecting the object of same the said defendants and each of them *had in their possession* a large quantity of heroin and cocaine as above stated. [R. p. 4.] [Italics ours.]

The decisions of this Court have often recognized the distinction, above suggested, between search for the instruments of crime as opposed to search for the evidence of crime. It is submitted that this case falls within the authority of *Adams* v. *New York*, 192 U. S. 585, 598. And the other cases in this Court, denouncing unlawful searches, make no attempt to cover the point here involved.

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common

law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. [*Boyd* v. *United States,* 116 U. S. 616, 623.]

[*Cf. Carroll and Kiro* v. *United States,* in this Court, March 2, 1925, unreported as yet.]

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, s. 211; Wharton, Crim. Plead. and Practice, 8th ed., s. 60; *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused. [*Weeks* v. *United States,* 232 U. S. 383, 392.]

II

It is undoubted law that an officer who arrests a person for felony committed in his presence has the right to search the accused in order to discover the instruments and fruits of his crime. This was done in the present case (*vide* supra), with the result that cocaine was found upon Frank Agnello, and marked money upon Alba. (R. pp. 79, 90.) But the cases go further than this. They allow a search, not merely of the person of the accused, but also of the place where he is discovered, and of any other places in the immediate vicinity which are clearly indicated as having formed part of the scene of the crime.

Dillon v. *O'Brien and Davis*, 16 Cox C. C. 245.
Getchell v. *Page*, 103 Me. 387.
Kneeland v. *Connally*, 70 Ga. 424.
1 Bishop, Cr. Proc., s. 211 (2d Ed.).
1 Wharton, Cr. Proc., s. 97 (10th Ed.).

The foregoing were cited with approval by this Court in *Carroll and Kiro* v. *United States*, supra. In addition may be cited:

People v. *Chiagles*, 237 N. Y. 193, affirming 204 App. Div. 706.
People v. *Cona*, 180 Mich. 641.
Smith v. *Jerome*, 47 Misc. (N. Y.) 22.
State v. *Mausert*, 88 N. J. L. 286.
Closson v. *Morrison*, 47 N. H. 482.
Spalding v. *Preston*, 21 Vt. 9.

The Constitution protects the people from *unreasonable* searches. It is admitted that searches

are not necessarily reasonable when they are made under warrants, for the warrant may have been issued for an improper purpose. *Robinson* v. *Richardson*, 13 Gray (79 Mass.), 454. But it does not follow that searches are necessarily unreasonable in all cases where they are made without warrants. This Court, in a recent decision, has expressly held that a search may be reasonable when made upon probable cause, even though no warrant is used. *Carroll and Kiro* v. *United States*, supra. The sanctity which the law attaches to the home is certainly no greater than the sanctity which it attaches to the person. Indeed, the immunity of the person from arbitrary arrest is more highly prized than the immunity of the home from arbitrary search. But it is conceded to be sound law that because an arrest is made without a warrant it is not, for that reason alone, an unlawful arrest. It is justified, *inter alia*, when the person who is arrested has committed a felony in the presence of the person who makes the arrest. And it is submitted that a search without warrant is justified under the same circumstances and by reason of the same pressing need.

The opinion of the Circuit Court of Appeals raises this question in respect to the facts of this case:

> It seems to be admitted that the agents had the right to arrest these defendants without a warrant and had a right without a warrant to search their persons—a crime

having been committed in their presence. But it is denied that the agents had any right to go from the place of the arrest to No. 167 Columbia Street, from which all the defendants but Alba were seen by the agents to emerge a short time before and from which they were supposed to have obtained the drugs which Centerino had informed the Government's agent he was going out to get and there search without a warrant the room of the defendant Frank Agnello. The question thus raised is one of great importance. May an agent of the Government, in a case where he can arrest without a warrant and search the person without a warrant, search also without a warrant the home of the person so arrested? Is such a search and seizure to be regarded as such an "unreasonable" search and seizure as violated the constitutional rights of Frank Agnello? [R. pp. 522–523, 290 Fed. 671, 673.]

In this case the officers were undoubtedly apprised by their senses, in the most direct way, that a crime was committed in their presence by the selling of narcotics at 138 Union Street. They were also apprised by their senses that the instrument of the crime (a supply of narcotics) was concealed in the places where the search was afterwards made. Two of the officers saw the sale through the window. (R. pp. 76, 218.) Two had seen all the defendants (except Alba) emerge from No. 167 Columbia Street a few minutes before the arrest. (R. pp. 74, 126.) The Government's in-

formers, Napolitano and Dispenza, had been told by Centerino that he would go out to his friend's house and bring back the stuff. (R. pp. 21, 230.) Officer Oyler testified that immediately after the arrests were made he questioned the defendants, with the following results:

> Questioning defendant Pace: I asked him where his place of business was, and he said, "No. 167 Columbia Street." I said, "That is the same house they brought the narcotics out of." * * * I said, "What do you import? Narcotics?" He would not answer. [R. pp. 133, 134.]
>
> Questioning defendant Thomas Agnello: He came over with Pace. He said that he and Pace were partners. I asked Pace if that was right and he said "Yes." I then asked them where they lived, again, and they said at 167. *I informed him that we were going to search that house, they said "All right."* [R. p. 135.] [Italics ours.]

Thus it will be seen, from an examination of the record, that the officers knew, before making the arrests, that a sale of drugs would be consummated at 138 Union Street. They knew, moreover, that the supply was coming from some other house in the vicinity. But until the night of the arrests there was nothing to show them from which house; so it would have been impossible to apply for a search warrant in advance. They had watched outside No. 138 Union Street on the Saturday night, two days before the arrests. On that occasion the defendants Centerino and Alba had sup-

plied Napolitano and Dispenza with samples of narcotics and had arranged for another meeting on Monday evening. (R. pp. 13, 18.) On the night of the arrests the officers saw Centerino leave the house, No. 138 Union Street. They followed him first to 172 Columbia Street and then to 167. They saw him leave the latter place with three other defendants. On his return to 138 Union Street, they saw the sale take place almost at once. They found narcotics on the person of Frank Agnello. Under these circumstances the officers first arrested the offenders and then at once proceeded to search for the instruments of the crime at the two places from which the defendants had just been seen to come. It is submitted that these circumstances are precisely those which were contemplated in *Boyd* v. *United States,* and in *Weeks* v. *United States* (supra, pp. 7–8) as exceptions to the general rules therein laid down. The offenders are captured red-handed. Admittedly, no warrant is required for the arrest. Will a warrant then be required for an immediate search of the place where it clearly appears to the officers' own knowledge that the instruments of the crime are concealed?

It is submitted that the Circuit Court of Appeals, in this case, following the decisions of other Circuit Courts of Appeal, laid down the correct test—namely, that where an officer may arrest without warrant, he may also at that same time search without warrant in any place in the immediate vicinity

where it is clearly indicated that the *instruments of the crime* (not evidence merely) are hidden.

> *Milam* v. *United States,* 296 Fed. 629.
> *Lambert* v. *United States,* 282 Fed. 413.
> *Vachina* v. *United States,* 283 Fed. 35.
> *McBride* v. *United States,* 284 Fed. 416.
> *Herine* v. *United States,* 276 Fed. 806.
>
> "Burglars' tools, used by the owner to commit a crime, may be kept from his possession when found on his person *or on his premises or elsewhere* * * *." [Italics ours.] [*United States* v. *Hart,* 214 Fed. 655, 662.]
>
> A crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe, or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime. [*Ex parte Morrill,* 35 Fed. 261, 267.]

According to the rule laid down in the case last cited, it might well be argued that a crime was committed in the presence of the officers, not only at 138 Union Street, the place of the arrest, but also at 167 Columbia Street, the place of the search. In addition, it seems clear that the officers had *probable cause* for the search as well as for the arrest under the recent decision of this Court in the *Carroll*

case, supra. Cf. *Stacey* v. *Emery,* 97 U. S. 642, 645. And upon this theory, the search would of itself be clearly valid, even when viewed apart from the arrest.

III

Even if it should be held that the search and seizure in this case were unlawful, there are further reasons why this conviction should not be disturbed. In the first place, no demand was made on behalf of Agnello or any other one of the defendants for the return of the narcotics, although they must have known of the seizure. There is not a word in the record to show that the defendants were taken by surprise by the introduction in evidence of the seized articles. Even after the Government had sought, unsuccessfully, to introduce the seized article as part of its main case, the defendants made no motion for its return, but contented themselves with objecting to its admission in evidence. Under these circumstances, there is no room to apply the rule of *Gouled* v. *United States,* 255 U. S. 298, that when the defendant knows nothing of the unlawful search until the evidence thereby obtained is introduced at the trial, his objection will not be regarded as coming too late. Neither is there room to apply the rule of *Amos* v. *United States,* 255 U. S. 313, for in that case the objection was taken, and the petition for return was presented, immediately after the jury was sworn, *and before any evidence was offered.*

This Court has never yet receded from the doctrine enunciated in *Adams* v. *New York*, 192 U. S. 585, and *Weeks* v. *United States*, 232 U. S. 383, that a collateral issue as to the source of evidence will not be permitted to interrupt a criminal trial unless the ground has been prepared by a timely motion for the return of the articles alleged to have been wrongly taken. The Government rests its argument on this point squarely upon those cases. In *Weeks* v. *United States*, this Court said:

> It is therefore evident that the *Adams Case* affords no authority for the action of the court in this case, *when applied to in due season for the return of papers seized in violation of the Constitutional Amendment.* [Italics ours.] [232 U. S. 383, 396.]

It is a reasonable deduction that the *Adams Case does* afford authority for the action of the court, when, as in the present case, it is *not* applied to in due season for the return of articles so seized. And again, the Court in *Weeks* v. *United States* said:

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; *that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application* a denial of the constitutional rights of the accused, and that the court should have re-

stored these letters to the accused. [Italics ours.] [232 U. S. 383, 398.]

Cf. *People* v. *Marxhausen,* 204 Mich. 559, 573.

Weeks v. *United States* lays down the requirement of a preliminary motion for the return of articles unlawfully seized. *Gouled* v. *United States* dispenses with the necessity for this motion where it is obvious that the defendant is taken by surprise and had no opportunity to make the motion before trial. In the absence of such a motion and in the absence of any proof of surprise the rule of *Adams* v. *New York,* approved and followed in *Weeks* v. *United States,* should be adhered to; and the court will not frame a collateral issue to discover the source of evidence otherwise admissible.

IV

Again, even if it should be held that the search and seizure in this case were unlawful, attention is directed to the manner in which the evidence was employed. Its introduction as part of the Government's main case was sought *and refused.* The Government then proceeded to establish the guilt of the defendants by other evidence, entirely independent of the search or of any information directly or indirectly obtained by the search. An examination of the record will show that this independent evidence was of itself more than sufficient to warrant a conviction. It was only when the defendant Frank Agnello, on the witness stand, resorted to

obvious falsehoods, testifying that he did not know that he was carrying narcotics on the night of the arrest, that he had never seen narcotics before, and that he had never seen the can of cocaine hydrochloride until the trial—it was only then, in rebuttal of these statements, that the Government was permitted to give evidence that the can had been found in his room. R. pp. 472, 476–477, 487–488. The evidence of the search was used only as a medium of discrediting the witness, and was not used in any way either as a direct part of the Government's main case, or as an indirect clue toward obtaining other evidence. In this respect the case at bar differs from all the previous cases in which this Court has discountenanced the practice of unlawful search and seizure to obtain evidence on which to build up a case against the defendant. Here the Government's case was complete without resort to the evidence of the search; and the error, if it existed, was not prejudicial.

Laughter v. *United States,* 259 Fed. 94, 100. Certiorari denied, 249 U. S. 613.

Judicial Code, s. 269, as amended by Act of February 26, 1919, c. 48, 40 Stat. 1181.

Hall v. *United States,* 277 Fed. 19.

Rich v. *United States,* 271 Fed. 566.

V

In any event, the evidence of the search and seizure tended to prejudice only one of the defendants—namely, Frank Agnello—in whose room the search was made and whose testimony the Govern-

ment sought to impeach by introduction of the seized article. Even if it be conceded that its admission was error as to him, the other defendants are not entitled to object. Officer Oyler stated that at least two of the other defendants were informed of the proposed search and that they consented. (R. p. 135, quoted *supra*, p. 12.) None of them asked for an instruction to limit the effect of the evidence of the seizure. The case against them was complete without that evidence, and the jury was fully warranted in finding them guilty.

Hyde v. *United States*, 225 U. S. 347, 374.
Isaacs v. *United States*, 159 U. S. 487.

VI

The defendants attack the indictment on the ground that it does not state facts sufficient to constitute a crime. The alleged defect is that the indictment charges a conspiracy to sell heroin and cocaine but fails to charge a conspiracy to sell *within the United States.*

This contention is without merit. In the first place, the indictment states that the defendants conspired in Brooklyn, and sets forth as one of the overt acts (No. 4) a transportation and sale in Brooklyn. An indictment for conspiracy need do no more than this.

Hyde v. *United States*, 225 U. S. 347.
Wallace v. *United States*, 243 Fed. 300; certiorari denied, 245 U. S. 650.
Vane v. *United States*, 254 Fed. 28, 30.

In the second place, it states that the conspiracy was to sell "without having first registered with the Collector of Internal Revenue of *this* district." (R. p. 4.) It is a reasonable inference from that statement that the sale was to be made within the United States and within the particular Internal Revenue district where the Grand Jury was sitting. If the sale was to be made outside the United States, or in another Internal Revenue district within the United States, registration in "*this*" district would be wholly immaterial; and there would be no reason to charge a failure to register in "*this*" district. Reasonable inferences from facts clearly charged may be indulged in ascertaining the meaning of an indictment.

Rosen v. *United States,* 161 U. S. 29, 34.
Dunbar v. *United States,* 156 U. S. 185.

In the third place, even if it be granted that a defect exists, it is merely formal, and the defendants are not entitled to relief. They attacked the indictment by a general motion in arrest of judgment, on the ground that it did not state facts sufficient to constitute a crime. No reasons were assigned for this motion, and the attention of the court was not directed to this defect or to any other. The defect, if it existed, was such that it could be attacked only by demurrer, by motion to quash, or by a request for a bill of particulars.

R. S. 1025.
Holmgren v. *United States,* 217 U. S. 509.

Armour Packing Co. v. *United States*, 209 U. S. 56, 83.

VII

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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APRIL, 1925.